Cross Border Transactions under the New Swiss Merger Act

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A. Introduction

1. The Swiss Merger Act (MerA, or the Act) appears to be a frontrunner, at least in Europe, with regard to the completeness of its rules on private international law. The Swiss rules on conflicts of law, set forth in the Swiss Code on Private International Law (CPIL) of 1987, have been adapted to the Act. As a result, they explicitly admit and recognize, to the widest extent possible, cross border transactions or foreign transactions of the kind dealt with in the Act. This recognition relates to the following transactions:

   11 Change of Status, i.e. submission

      a) of a foreign company to Swiss law, or

      b) of a Swiss Company to a foreign law.

   12 Merger

      a) of a foreign company by a Swiss company, or

      b) of a Swiss company by a foreign company.

   13 De-merger by transfer

      a) of all or part of the assets and liabilities of a foreign company to one or several Swiss companies, or

      b) of all or part of the assets and liabilities of a Swiss company to one or several foreign companies.

   14 Transfer of Patrimony (assets and liabilities)

      a) by a foreign to a Swiss company, or

      b) by a Swiss to a foreign company.

   15 Furthermore, the CPIL states (sect. 164 b) that all these types of transactions, if effected solely between foreign companies, shall be recognized as valid in Switzerland provided they are valid under the foreign legal systems concerned.

2. The rules of the CPIL on the transactions in question refer to companies or, at times, to capital companies. Capital companies under Swiss law are joint stock companies and limited liability companies. I will therefore also use this terminology even though the Act deals with a much larger variety of legal entities including individual business enterprises, associations, cooperative societies, and even foundations.

3. All cross border transactions involve at least two countries and, consequently, two sets of rules on conflicts of law and possibly two sets of substantive law. The new Swiss rules recognize this simple fact in that they state that each transaction must be recognized by and comply with the legal requirements of all countries involved. This concept is called *Vereinigungstheorie* or *Unification theory*. The theory applies to all circumstances that necessarily touch on both countries involved. So:

   a) Both countries must recognize in principle the type of transaction at hand. If e.g. a Swiss company is to emigrate, i.e. transfer its legal domicile, to France, Swiss law must recognize the concept of emigration, whereas France must recognize the concept of immigration of companies. Interestingly, the reverse concept does not appear to be possible since France seems to recognize only the immigration of foreign companies but not the emigration of French companies.

   b) The legislation of the "receiving" country must know a type of company corresponding to the one of the country of origin. Now, what does "corresponding" mean? It may sound simple in the case of joint stock companies or limited liability companies. However, already the distinction between a capital company (in which liability is limited to its own assets) and a partnership (in which one or several partners are jointly and severally liable for the obligations of the company) may pose problems. It becomes even more complicated when we start analyzing details such as protection of shareholders' rights, protection of creditors and employees, preferential shares or fixed share capital. In order to avoid unpleasant surprises, a detailed analysis of the law at both ends is inevitable.

   c) Merger and de-merger agreements as well as agreements on the transfer of patrimony have to comply with the substantive

laws of both countries, with the consequence that the stricter set of rules prevails.

4. Notwithstanding the unification theory, there remain important elements of the transactions that by necessity are governed by the substantive law of only one country. Examples:

   a) The calling and the holding of a shareholders' meeting summoned to approve the transaction have to comply solely with the law of the country where the company is (still) incorporated.

   b) The same holds true with regard to the rights to submit motions, the quorum necessary for certain resolutions, and the requirement of certain public announcements.

B. Change of Status

1. The Act and – more precisely – the CPIL allow the change of status of companies in both directions (sects. 161 to 163 CPIL) *without liquidating and re-incorporating*.

2. A foreign company desirous to move to Switzerland has to satisfy the requirements of the foreign law and adopt one of the company types available under Swiss law.

   a) These requirements of the foreign law may include procedural rules, conditions of registration and de-registration, rules relating to the protection of creditors, employees and minority shareholders, but also, as the case may be, aspects of tax and currency legislation.

   b) If the type of company chosen requires registration with the Swiss commercial register the company will be governed by Swiss law as soon as it proves that its centre of business activities has also been transferred to Switzerland (sect. 162 para 1 CPIL.

   c) A capital company, in addition, must prove by means of a report of a specially qualified auditor that its share capital is covered (i.e. paid-in in cash or kind) in accordance with Swiss law (sect. 162 para 3 CPIL).

   d) If a form of organization corresponding to the one of the emigrating company cannot be found in Swiss law, the simple change of status cannot be effected and other solutions need

to be found. These can include e.g. the dissolution of the foreign company and the transfer of its assets and liabilities as contribution in kind to a newly created Swiss company.

3. A Swiss company willing to move abroad has also to meet a number of requirements. The most important ones are:

   a) It has to ensure that the equity and membership rights of its shareholders are preserved under the foreign law.

   b) It has to submit to its shareholders a report on the planned change of status, on the conversion of the equity rights and on the rights to information. It also has to submit a balance sheet as per the last full or half year-end, whichever is less than six months back from the date of the report.

   c) The creditors shall be notified and asked to file their claims in a public notice announcing the proposed amendment to the legal status of their company. They then may require that their claims be secured within two months of being notified (sect. 46 MerA). Such securing of claims is not necessary if the company demonstrates that the change of status will not impair the satisfaction of any claim.

   d) Finally, the emigrating company may only be stricken off the Swiss commercial register after a specially qualified auditor has issued a report certifying that the creditors' claims have been secured or satisfied, or that the creditors consent to its being struck off (sect. 164 para 1 CPIL).

C. Mergers

1. As outlined in the introduction, both (or all) countries involved must recognize the concept of merger of companies (unification theory). From the point of view of Swiss law, the concept requires that in a merger the whole patrimony – i.e. assets and liabilities – of the transferring company passes on to the absorbing company *uno actu* by means of *universal succession* (in German *Universalsukzession*), the transferring company ceases to exist thereafter, and the equity and membership rights of its shareholders are secured. These principles apply to mergers by absorption as well as to mergers by combination.

2. Swiss law governs all mergers where a Swiss company absorbs or combines with a foreign company; the respective foreign law applies on mergers where the foreign company survives (sect. 163 a para 2 and 163 para 4 CPIL).

3. An interesting solution is offered with respect to the merger agreement that deals with the details of the proposed transaction: In the first instance, the law chosen by the parties governs the agreement. In the absence of a choice of law, the agreement is governed by the law of the country with which it is most closely connected. In this case, it is assumed that the closest connection exists with the country of the acquiring company (sect. 163 c para 2 CPIL).

4. There are a number of peculiarities that may not be easy to deal with. I will give you just one example: A foreign company may absorb or combine with a Swiss company *if the Swiss company proves* that (sect. 163 b paras 1 and 2):

   a) upon merging its assets and liabilities will pass on to the foreign company; and

   b) the equity and membership rights will be adequately protected in the foreign company; and

   c) the Swiss company shall comply with all of the requirements of Swiss law that apply to the transferring company.

   This evidence has to be rendered to the Swiss commercial register as a precondition of its striking the company off the register. However, in which way the Swiss company can gather such evidence, remains open. Some commentators propose to present an extract from the foreign register of commerce (assuming such register exists) showing that the whole patrimony has passed on to the foreign company. Other proposals include the presentation of a legal opinion. The Swiss ordinance on the commercial register requires evidence that the foreign company exists, a confirmation by the "competent foreign authorities" on the admissibility of the merger under the foreign law, and, as in the case of an emigrating Swiss company, a confirmation of a specially qualified auditor that the creditors' claims are secured.

5. As I have just shown, the attempt of a foreign company to absorb or combine with a Swiss company may well turn into a veritable obstacle race! Experience will show whether this type of transaction

will ever happen. And even if all the problems are solved, there still remains the hurdle of Swiss tax law. If our Swiss company, willing to throw itself into the arms of its foreign admirer, happens to have hidden reserves, it will first have to recognize these reserves as income and pay corporate income tax thereon. Luckily, taxation is not my subject today! However, of course, alternative solutions can be found to overcome this threat as well.

D. De-mergers and Transfer of Patrimony

1. The provisions of the CPIL on mergers apply "accordingly" to de-mergers and transfers of patrimony (sect. 163 d para 1 CPIL). Consequently, these transactions are governed by the law applicable to the company that splits or transfers its patrimony to another entity (sect. 163 d para 2 CPIL). Here, too, the unification theory applies: The transactions have also to be known by the legal system of the foreign country involved, and the requirements of all laws involved have to be met.

2. The notions of de-merger and transfer of patrimony are not defined in the Act. Swiss doctrine defines a de-merger as a transaction where all or part of the patrimony of a company are transferred *uno actu* to one or several other (existing or new) companies, whereby the shareholders of the transferring company receive shares of the receiving company or companies as consideration. Likewise, in a transfer of patrimony one legal entity may transfer a patrimony, i.e. certain assets and liabilities, to another legal entity. Here again, the passing of rights and obligations to the receiving entity takes place *uno actu*, by means of universal succession. Contrary to the de-merger, the consideration for the transfer of patrimony does not consist of shares of the receiving company.

3. The transfer of patrimony comprises necessarily more than one asset of the transferring entity, but need not include liabilities. Furthermore, the leading doctrine holds that, in de-mergers and transfers of patrimony, not only individual assets and liabilities pass on to the acquirer but also contractual relationships. It should be noted, however, that these contracts – e.g. distribution agreements - may stipulate barriers to any unwelcome change in the form of change of ownership clauses, rights of termination etc.

E. Procedural Issues

1. In the cases of mergers and de-mergers by emigration, the CPIL requires that the equity and membership rights of the shareholders of the transferring Swiss company be adequately preserved (sect. 163 b para 1a and 163 d para 1 CPIL). These provisions of course aim at the protection of minority shareholders. To this end, the Act provides a claim with which each shareholder may demand within two months of the publication of the transaction that the court determine a reasonable amount of compensation (sect. 105 para 1 MerA). This claim may also be filed against the foreign acquirer at the place where the transferring Swiss entity has its registered office (sect. 164 a para 1 CPIL).

2. However, the CPIL provides also that differing rules of international treaties prevail over the CPIL. One such treaty is, as we all know, the Lugano Convention. According to sect. 2 of the Convention, claims against persons domiciled in a contracting state have to be brought before the courts of that state. Exceptions such as those set forth in sect. 5 of the Convention do not apply.

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Suggested Readings

Balthasar BESSENICH:
Das neue Fusionsgesetz: internationale Aspekte, in Aktuelle Juristische Praxis. 7/2004, p. 851 et seq.

Daniel GIRSBERGER / Rodrigo RODRIGUEZ:
Fusionsgesetz und Internationales Privatrecht, in Schweizerische Zeitschrift für Wirtschaftsrecht, 2004, p. 259 et seq.

Frank VISCHER:
Züricher Kommentar zum IPRG, zu Art. 161-165, Zürich 2004

Roland M. MÜLLER:
Zürcher Kommentar zum Fusionsgesetz zu Internationale Fusion, p. 261 et seq., Zürich 2004

Kurt SIEHR:
Das Internationale Privatrecht der Schweiz, Zürich 2002

BOTSCHAFT des Schweizerischen Bundesrates zum Fusionsgesetz, Bern 2000, BBL 2000, p. 4337 et seq.